No. 902 LIBRARY SUPREME COURT U. S.

FILED
MAY 8. 1959
JAMES R. BROWNING, Clerk

To be argued by
Paul Ginsburg of Pittsburgh

United States Court of Appeals

FOR THE SECOND CIRCUIT

NO. 25312

PAUL GINSBURG, Plaintiff-Appellant,

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant-Appellee.

MOTION TO REMAND

PAUL GINSBURG
Appellant, Pro se

Carlton House
550 Grant Street
Pittsburgh 19, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

MOTION TO REMAND

Paul Ginsburg, appellant, moves this Honorable Court to enter an Order,

Vacating its Order of February 19, 1959, denying his Petition for Rehearing;

Vacating its Order of January 28, 1959, affirming the decision of Judge Bicks below;

Then, upon reconsideration, remanding the cause with instructions to enter summary judgment for plaintiff-appellant and against defendant-appellee; and

In support hereof avers:

1. The Per Curiam Opinion of Circuit Judges Medina, Lumbard and Burger, which accompanied their denial of the Petition for Rehearing, contains three sentences. The first two sentences thereof fully justify this motion, while the third one simply explains why the Judges did not previously state "the reason" for their affirmance when they affirmed. Again, conspicuous by absence therefrom is any legal authority whatever for affirmance, which justifies appellant's contention that there is none.

2. They tacitly admit in the first sentence that there is no "valid outstanding injunction" *enforceable by them in New York* when they opine, "The basis for our affirmance is the existence of a valid outstanding injunction restraining the further prosecution of this case by appellant". Assuming *arguendo* that the supposed injunction is valid in Pennsylvania and/or Arizona, which it is not, nevertheless that in and of itself does not establish any basis for enforcement in New York. It is elementary that in order to enforce an injunction order of a foreign jurisdiction, there must first be ob-

tained a valid injunction order in this jurisdiction based thereon. It is a matter of record herein that this was not done.

As A Court Of Law, These Judges Never Heard Of The Injunction.

3. The record herein makes it manifest that the defendant-appellee admitted it has failed to plead the "injunction" pursuant to the Federal Rules of Civil Procedure and thus has waived its right, if any, to do so. **Furthermore, District Judge Bicks knew this or he would not have entered the Order (7a),** which he did, ordering the plaintiff to "file a note of issue for trial, or take other action to obtain a determination of the above entitled action within 120 days from the date of this order" and "if such action is not taken within the said period, the above entitled action may be dismissed without further notice, for want of prosecution, without costs". Does not the Order appealed from, as well as the affirmance thereof, conflict with said 120 day Order? It should be pointed out here that after service of the Note of Issue, no objection thereto was made by the defendant. As a matter of fact and of record, the defendant never even appeared in this action until after service of plaintiff's Motion for Summary Judgment, when it belatedly entered a "special appearance". **Is not this one matter of fact and of record itself sufficient to establish the point of plaintiff-appellant that the defendant-appellee never even attempted to obtain an injunction order here pursuant to the Federal Rules of Civil Procedure?** How else could the defendant have obtained a legal, enforceable injunction order except under the Rules? How can responsible Judges of a court of record get around this

point? Of course, they cannot get around it legally. They can do it only by setting a dangerous precedent, by giving favorable consideration to matters *de hors* the record just as if they were properly pleaded and proved. The honor of the fair administration of justice in the Federal System has already suffered too much. To add this insult to the already inflicted injury, would be disastrous.

Does This Court Always Refuse To Consider Technical Matters, Even When Supported By The Law Of The Land?

4. In the second sentence of said Per Curiam Opinion the Judges stated, "None of the technical arguments advanced by appellant furnish any ground for the disregard by us of this injunction". Here again we have simply the Judges' personal opinion. What this Court has brushed off as "technical arguments" are sound legal propositions which are fully supported by the Law of the Land. It is respectfully submitted that if they are good enough for the Supreme Court and Courts of Appeals for other circuits, this Court should certainly give them favorable consideration.

Is It True That The Gigantic Mutual Life Insurance Company Of New York Cannot Take Care Of Itself?

5. District Judge Bicks assumed the dual role of guardian and counsel for the defendant. The Judges of this Court should indeed be above such a departure. They should prove by their actions that appellant's constitutional guaranties will be lived up to by this Court

even though his contractual guaranties have not been lived up to by Mutual. Neither District Judge Bicks nor the appellee can sincerely deny that it is at least poetic justice that Mutual of New York should now find itself on the "technical" spot whence there is no lawful escape from its liabilities imposed by law. By granting the instant motion, this Honorable Court will uphold the law and block the temporary escape which Judge Bicks tried to donate to the defendant unlawfully. Incidentally, it is hoped that the consideration of this motion will not be influenced by the fact that a law partner of Harold R. Medina, Jr., Esquire, is on the Board of Trustees of The Mutual Life Insurance Company of New York. Said law partner is Roswell Magill, Esquire, of Cravath, Swaine & Moore.

Chip On The Shoulder.

6. If it be contended that the appellant has "a chip on his shoulder", that would not be denied. The "chip" is evidently justified and fully supported. This means that the Judges of this Honorable Court should try to support their affirmance, if they can, under the Rules and the applicable law, as well as to refute, if they can, the legal authorities already submitted by appellant in support of all of his points. If the Judges can and will do so, then your appellant will apologize profusely for having exercised his right to criticize and abandon this action. Otherwise, how can the Judges expect appellant to have confidence in the sincerity or legality of their decision?

The Supreme Court Will Grant Certiorari.

7. An important consideration governing the grant of certiorari by the Supreme Court arises where a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision. *Here we have both the departure and the sanctioning.* Furthermore, Mr. Justice Harlan, in advising lawyers on certiorari in a lecture delivered last month before the Association of the Bar of the City of New York, suggested that the surest way to get a petition for a writ of certorari granted is to show that the case turns on an issue of federal law as to which there is a conflict of decisions among the lower federal courts. *Here we have a conflict not only with other circuits as well as this one, but also with the Supreme Court.*

PAUL GINSBURG,
Counsel for Plaintiff-Appellant.

Dated: 24 February 1959.